



## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 63

[EPA-OAR-2023-0406; FRL-10652-01-OAR]

RIN 2060-AV97

### Removal of Affirmative Defense Provisions from the National Emission Standards for Hazardous Air Pollutants for the Oil and Natural Gas Production Facility and Natural Gas Transmission and Storage Facility Source Categories

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** The EPA is proposing amendments to the National Emission Standards for Hazardous Air Pollutants for the oil and gas industry issued under the Clean Air Act.

Specifically, the EPA is proposing to remove the affirmative defense provisions of the National Emission Standards for Hazardous Air Pollutants for both the Oil and Natural Gas Production source category and the Natural Gas Transmission and Storage source category.

**DATES:** *Comments.* Comments must be received on or before **[INSERT DATE 45 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

*Public hearing:* If anyone contacts us requesting a public hearing on or before December 6, 2023, we will hold a virtual public hearing. See **SUPPLEMENTARY INFORMATION** for information on requesting and registering for a public hearing.

**ADDRESSES:** You may send comments, identified by Docket ID No. EPA-HQ-OAR-2023-0406, by any of the following methods:

- Federal eRulemaking Portal: <https://www.regulations.gov/> (our preferred method).  
Follow the online instructions for submitting comments.
- Email: [a-and-r-docket@epa.gov](mailto:a-and-r-docket@epa.gov). Include Docket ID No. EPA-HQ-OAR-2023-0406 in the subject line of the message.

- Fax: (202) 566-9744. Attention Docket ID No. EPA-HQ-OAR-2023-0406.
- Mail: U.S. Environmental Protection Agency, EPA Docket Center, Docket ID No. EPA-HQ-OAR-2023-0406, Mail Code 28221T, 1200 Pennsylvania Avenue, NW, Washington, DC 20460.
- Hand/Courier Delivery: EPA Docket Center, WJC West Building, Room 3334, 1301 Constitution Avenue, NW, Washington, DC 20004. The Docket Center's hours of operation are 8:30 a.m. – 4:30 p.m., Monday – Friday (except Federal holidays).

*Instructions:* All submissions received must include the Docket ID No. for this rulemaking. Comments received may be posted without change to <https://www.regulations.gov/>, including any personal information provided. For detailed instructions on sending comments and additional information on the rulemaking process, see the **SUPPLEMENTARY INFORMATION** section of this document.

**FOR FURTHER INFORMATION CONTACT:** For questions about this proposed action, contact U.S. EPA, Attn. Matthew Witosky, Mail Drop: E143-05, 109 T.W. Alexander Drive, P.O. Box 12055, RTP, North Carolina 27711; telephone number: (919) 541-2865; and email address: [witosky.matthew@epa.gov](mailto:witosky.matthew@epa.gov).

**SUPPLEMENTARY INFORMATION:**

*Participation in virtual public hearing.* To request a virtual public hearing, contact the public hearing team at (888) 372-8699 or by email at [SPPDpublichearing@epa.gov](mailto:SPPDpublichearing@epa.gov). If requested, the hearing will be held via virtual platform on **[INSERT DATE 15 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. The hearing will convene at 11 a.m. Eastern Time (ET) and will conclude at 3 p.m. ET. The EPA may close a session 15 minutes after the last pre-registered speaker has testified if there are no additional speakers. The EPA will announce further details at <https://www.epa.gov/controlling-air-pollution-oil-and-natural-gas-industry/actions-and-notices-about-oil-and-natural#neshap>.

If a public hearing is requested, the EPA will begin pre-registering speakers for the hearing no later than 1 business day after a request has been received. To register to speak at the virtual hearing, please use the online registration form available at <https://www.epa.gov/controlling-air-pollution-oil-and-natural-gas-industry/actions-and-notices-about-oil-and-natural#neshap> or contact the public hearing team at (888) 372-8699 or by email at [SPPDpublichearing@epa.gov](mailto:SPPDpublichearing@epa.gov). The last day to pre-register to speak at the hearing will be December 13, 2023. Prior to the hearing, the EPA will post a general agenda that will list pre-registered speakers at: <https://www.epa.gov/controlling-air-pollution-oil-and-natural-gas-industry/actions-and-notices-about-oil-and-natural#neshap>.

The EPA will make every effort to follow the schedule as closely as possible on the day of the hearing; however, please plan for the hearings to run either ahead of schedule or behind schedule.

Each commenter will have 4 minutes to provide oral testimony. The EPA encourages commenters to provide the EPA with a copy of their oral testimony electronically (via email) by emailing it to [witosky.matthew@epa.gov](mailto:witosky.matthew@epa.gov). The EPA also recommends submitting the text of your oral testimony as written comments to the rulemaking docket.

The EPA may ask clarifying questions during the oral presentations but will not respond to the presentations at that time. Written statements and supporting information submitted during the comment period will be considered with the same weight as oral testimony and supporting information presented at the public hearing.

Please note that any updates made to any aspect of the hearing will be posted online at <https://www.epa.gov/controlling-air-pollution-oil-and-natural-gas-industry/actions-and-notices-about-oil-and-natural#regactions>. While the EPA expects the hearing to go forward as set forth above, please monitor our website or contact the public hearing team at (888) 372-8699 or by email at [SPPDpublichearing@epa.gov](mailto:SPPDpublichearing@epa.gov) to determine if there are any updates. The EPA does not intend to publish a document in the *Federal Register* announcing updates.

If you require the services of a translator or special accommodation such as audio description, please pre-register for the hearing with the public hearing team and describe your needs by December 8, 2023. The EPA may not be able to arrange accommodations without advanced notice.

*Docket.* The EPA has established a docket for this rulemaking under Docket ID No. EPA-HQ-OAR-2023-0406. All documents in the docket are listed in <https://www.regulations.gov/>. Although listed, some information is not publicly available, *e.g.*, Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy. With the exception of such material, publicly available docket materials are available electronically in Regulations.gov.

*Instructions.* Direct your comments to Docket ID No. EPA-HQ-OAR-2023-0406. The EPA's policy is that all comments received will be included in the public docket without change and may be made available online at <https://www.regulations.gov/>, including any personal information provided, unless the comment includes information claimed to be CBI or other information whose disclosure is restricted by statute. Do not submit electronically to <https://www.regulations.gov/> any information that you consider to be CBI or other information whose disclosure is restricted by statute. This type of information should be submitted as discussed below.

The EPA may publish any comment received to its public docket. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.*, on the Web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia

submissions, and general guidance on making effective comments, please visit

<https://www.epa.gov/dockets/commenting-epa-dockets>.

The <https://www.regulations.gov/> website allows you to submit your comment anonymously, which means the EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an email comment directly to the EPA without going through <https://www.regulations.gov/>, your email address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, the EPA recommends that you include your name and other contact information in the body of your comment and with any digital storage media you submit. If the EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, the EPA may not be able to consider your comment. Electronic files should not include special characters or any form of encryption and be free of any defects or viruses. For additional information about the EPA's public docket, visit the EPA Docket Center homepage at <https://www.epa.gov/dockets>.

*Submitting CBI.* Do not submit information containing CBI to the EPA through <https://www.regulations.gov/>. Clearly mark the part or all of the information that you claim to be CBI. For CBI information on any digital storage media that you mail to the EPA, note the docket ID, mark the outside of the digital storage media as CBI, and identify electronically within the digital storage media the specific information that is claimed as CBI. In addition to one complete version of the comments that includes information claimed as CBI, you must submit a copy of the comments that does not contain the information claimed as CBI directly to the public docket through the procedures outlined in *Instructions* above. If you submit any digital storage media that does not contain CBI, mark the outside of the digital storage media clearly that it does not contain CBI and note the docket ID. Information not marked as CBI will be included in the public docket and the EPA's electronic public docket without prior notice. Information marked

as CBI will not be disclosed except in accordance with procedures set forth in 40 Code of Federal Regulations (CFR) part 2.

Our preferred method to receive CBI is for it to be transmitted electronically using email attachments, File Transfer Protocol (FTP), or other online file sharing services (*e.g.*, Dropbox, OneDrive, Google Drive). Electronic submissions must be transmitted directly to the Office of Air Quality Planning and Standards (OAQPS) CBI Office at the email address *oaqpscbi@epa.gov*, and as described above, should include clear CBI markings and note the docket ID. If assistance is needed with submitting large electronic files that exceed the file size limit for email attachments, and if you do not have your own file sharing service, please email *oaqpscbi@epa.gov* to request a file transfer link. If sending CBI information through the postal service, please send it to the following address: OAQPS Document Control Officer (C404-02), OAQPS, U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711, Attention Docket ID No. EPA-HQ-OAR-2023-0406. The mailed CBI material should be double wrapped and clearly marked. Any CBI markings should not show through the outer envelope.

*Organization of this document.* The information in this preamble is organized as follows:

I. General Information

A. Does this action apply to me?

II. Proposed Rule Summary and Rationale

III. Summary of Cost, Environmental, and Economic Impacts

A. What are the affected sources?

B. What are the air quality impacts?

C. What are the cost impacts?

D. What are the economic impacts?

E. What are the benefits?

IV. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 14094: Modernizing Regulatory Review

B. Paperwork Reduction Act (PRA)

C. Regulatory Flexibility Act (RFA)

D. Unfunded Mandates Reform Act (UMRA)

E. Executive Order 13132: Federalism

F. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments

G. Executive Order 13045: Protection of Children from Environmental Health Risks and Safety Risks

H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

I. National Technology Transfer and Advancement Act (NTTAA)

J. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations and Executive Order 14096: Revitalizing our Nation's Commitment to Environmental Justice for All

## I. General Information

### A. Does this action apply to me?

Categories and entities potentially regulated by this action are shown in table 1 of this preamble.

TABLE 1. NESHAP AND INDUSTRIAL SOURCE CATEGORIES AFFECTED BY THIS PROPOSED ACTION

Source Category	NAICS	NAICS code <sup>1</sup>
Industry	211111	Crude Petroleum and Natural Gas Extraction
	211112	Natural Gas Liquid Extraction
	221210	Natural Gas Distribution.
	486110	Pipeline Distribution of Crude Oil.
	486210	Pipeline Transportation of Natural Gas
Federal Government		Not affected
State/Local/Tribal Government		Not affected

<sup>1</sup> North American Industry Classification System (NAICS).

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be affected by this action. To determine whether your facility would be regulated by this action, you should examine the applicability criteria in the regulations. If you have any questions regarding the applicability of this action to a particular entity, contact the person listed in the preceding FOR FURTHER INFORMATION CONTACT section.

## II. Proposed Rule Summary and Rationale

In 1998 the EPA promulgated National Emission Standards for Hazardous Air Pollutants (NESHAP) for the Oil and Natural Gas Production Facility and Natural Gas Transmission and Storage Facility Source Categories, 40 CFR part 63, subparts HH and HHH. 64 FR 32610 (June 17, 1999) (“Oil and Gas NESHAP”). In 2012, the EPA amended the Oil and Gas NESHAP. 77 FR 49490 (August 16, 2012). The 2012 amendments included provisions allowing owners and operators to assert an affirmative defense to civil penalties for violations caused by malfunctions. See 40 CFR 63.762 and 63.1672. Malfunctions are a sudden, infrequent, and not reasonably

preventable failure of air pollution control and monitoring equipment, process equipment, or a process to operate in a normal or usual manner. See 40 CFR 63.2. As defined in 40 CFR part 63, subparts HH and HHH, “affirmative defense” means, “in the context of an enforcement proceeding, a response or defense put forward by a defendant, regarding which the defendant has the burden of proof, and the merits of which are independently and objectively evaluated in a judicial or administrative proceeding.” See 40 CFR 63.761 and 63.1271. The EPA established an affirmative defense in 40 CFR part 63, subparts HH and HHH in an effort to create a system that incorporates some flexibility, recognizing that there is a tension, inherent in many types of air regulations, to ensure adequate compliance while simultaneously recognizing that despite the most diligent of efforts, emission standards may be violated under circumstances entirely beyond the control of the source (77 FR 49508).

Although the EPA recognized at the time that its case-by-case enforcement discretion provides sufficient flexibility in these circumstances, it included the affirmative defense to provide a more formalized approach and more regulatory clarity. *Id.* at 49508-9. See also, *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1057–58 (D.C. Cir. 1978) (holding that an informal case-by-case enforcement discretion approach is adequate); but see *Marathon Oil Co. v. EPA*, 564 F.2d 1253, 1272–73 (9th Cir. 1977) (requiring a more formalized approach to consideration of “upsets beyond the control of the permit holder”). Under the EPA’s regulatory affirmative defense provisions, if a source could demonstrate in a judicial or administrative proceeding that it had met the requirements of the affirmative defense in the regulation, civil penalties would not be assessed.

In 2014, the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit Court) vacated the affirmative defense in one of the EPA’s CAA section 112 regulations. *Natural Resource Defense Council (NRDC) v. EPA*, 749 F.3d 1055 (D.C. Cir., 2014) (vacating affirmative defense provisions in CAA section 112 rule establishing emission standards for Portland cement kilns) (*NRDC*). The court found that the EPA lacked authority to establish an



affirmative defense for private civil suits and held that under the CAA, the authority to determine civil penalty amounts in such cases lies exclusively with the courts, not the EPA. Specifically, the court found: “As the language of the statute makes clear, the courts determine, on a case-by-case basis, whether civil penalties are ‘appropriate.’” *Id.* at 1063 (“[U]nder this statute, deciding whether penalties are ‘appropriate’ in a given private civil suit is a job for the courts, not EPA.”).<sup>1</sup>

In light of the *NRDC* decision mentioned above, the EPA is proposing to remove the affirmative defense provisions from the Oil and Gas NESHAP. These provisions imply legal authority that the D.C. Circuit Court has stated that the EPA does not have.<sup>2</sup> As explained above, if a source is unable to comply with emissions standards as a result of a malfunction, the EPA may use its case-by-case enforcement discretion to provide flexibility, as appropriate. Further, as the D.C. Circuit recognized, in a citizen enforcement action brought under CAA section 304(a), the court has the discretion to consider any defense raised and determine whether penalties are appropriate. *Cf. NRDC*, 749 F.3d at 1064 (arguments that violation was caused by unavoidable technology failure can be made to the courts in future civil cases when the issue arises). The same is true for the presiding officer in EPA administrative enforcement actions.<sup>3</sup>

### **III. Summary of Cost, Environmental, and Economic Impacts**

---

<sup>1</sup> The court’s reasoning in *NRDC* focuses on civil judicial actions. The court noted that “EPA’s ability to determine whether penalties should be assessed for CAA violations extends only to administrative penalties, not to civil penalties imposed by a court.” *Id.*

<sup>2</sup> The EPA notes that in 2012, concurrent with the review of 40 CFR part 63, subparts HH and HHH, the EPA promulgated New Source Performance Standards for Crude Oil and Natural Gas Facilities, 40 CFR part 60, subpart OOOO (“NSPS OOOO”), which also included an affirmative defense. See 77 FR 49557. In a subsequent rulemaking following the *NRDC* decision, the EPA removed the affirmative defense provision from NSPS OOOO. 79 FR 79018 (Dec. 31, 2014).

<sup>3</sup> Although the *NRDC* case does not address the EPA’s authority to establish an affirmative defense to penalties that are available in administrative enforcement actions, we are not including such an affirmative defense in the proposed rule. As explained above, such an affirmative defense is not necessary. Moreover, assessment of penalties for violations caused by malfunctions in administrative proceedings and judicial proceedings should be consistent. *Cf.* CAA section 113(e) (requiring both the Administrator and the court to take specified criteria into account when assessing penalties).

*A. What are the affected sources?*

Sources subject to subparts HH and HHH under 40 CFR part 63 of the CAA as amended in 1990, section 112.

*B. What are the air quality impacts?*

There are no air quality impacts associated with this action. The affirmative defense provisions did not affect the stringency of the standards in 40 CFR part 63, subparts HH or HHH. The removal of the provisions does not have a material impact on the obligation for sources to comply with current existing standards, or the ability of Federal or State agencies to enforce standards.

*C. What are the cost impacts?*

There are no cost impacts associated with this action. The affirmative defense provisions did not affect the stringency of the standards in 40 CFR part 63, subparts HH or HHH. The removal of the provisions does not have a material impact on the obligation for sources to comply with current existing standards, or the ability of Federal or State agencies to enforce standards. The EPA estimated a small administrative burden to report deviations from standards as a result of malfunctions that included the option for an owner or operator to offer an affirmative defense. The removal of the affirmative defense provisions does not affect that burden because sources will still be required to report malfunctions that result in a failure to meet the standards. Since the option to invoke an affirmative defense was voluntary, there may be a negligible cost savings for reporting malfunctions by removing these provisions.

*D. What are the economic impacts?*

There are no economic impacts associated with this action. The affirmative defense provisions did not affect the stringency of the standards in 40 CFR part 63, subparts HH or HHH. The removal of the provisions does not have a material impact on the obligation for sources to comply with current existing standards, or the ability of Federal or State agencies to enforce standards. The EPA estimated a small administrative burden to report deviations from standards

as a result of malfunctions that included the option for an owner or operator to offer an affirmative defense. The removal of the affirmative defense provisions does not affect that burden because sources will still be required to report malfunctions that could have resulted in a failure to meet the standards. Since the option to invoke an affirmative defense was voluntary, there may be a negligible cost savings for reporting malfunctions by removing these provisions.

*E. What are the benefits?*

There are no environmental benefits associated with this action. The affirmative defense provisions did not affect the stringency of the standards in 40 CFR part 63, subparts HH or HHH. The removal of the provisions does not have a material impact on the obligation for sources to comply with current existing standards, or the ability of Federal or State agencies to enforce standards.

#### **IV. Statutory and Executive Order Reviews**

Additional information about these statutes and Executive Orders can be found at <https://www.epa.gov/laws-regulations/laws-and-executive-orders>.

*A. Executive Order 12866: Regulatory Planning and Review and Executive Order 14094: Modernizing Regulatory Review*

This action is not a significant regulatory action as defined in Executive Order 12866, as amended by Executive Order 14094, and was therefore not subject to a requirement for review under Executive Order 12866.

*B. Paperwork Reduction Act (PRA)*

This action does not impose any new information collection burden under the PRA. OMB has previously approved the information collection activities contained in the existing regulations and has assigned OMB control number 2060-0417. The removal of provisions for affirmative defense does not change any mandatory recordkeeping, reporting, or other activity previously established under prior final rules.

*C. Regulatory Flexibility Act (RFA)*

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. There are no economic impacts associated with this action. The affirmative defense provisions did not affect the stringency of the standards in 40 CFR part 63, subparts HH or HHH. The removal of the provisions does not have a material impact on the obligation for sources to comply with current existing standards, or the ability of Federal or State agencies to enforce standards.

*D. Unfunded Mandates Reform Act (UMRA)*

This action does not contain any unfunded mandate as described in UMRA, 2 U.S.C. 1531-1538, and does not significantly or uniquely affect small governments. The action imposes no enforceable duty on any State, local or Tribal governments or the private sector.

*E. Executive Order 13132: Federalism*

This action does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

*F. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments*

This action does not have Tribal implications as specified in Executive Order 13175. It will not have substantial direct effects on Tribal governments, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified in Executive Order 13175. Thus, Executive Order 13175 does not apply to this action.

*G. Executive Order 13045: Protection of Children from Environmental Health Risks and Safety Risks*

The EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that the EPA has reason to believe may disproportionately affect children, per the definition of “covered regulatory action” in section 2-202 of the Executive order. Therefore, this action is not subject to Executive Order 13045

because it does not concern an environmental health risk or safety risk. Since this action does not concern human health, the EPA's Policy on Children's Health also does not apply.

*H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution or Use*

This action is not subject to Executive Order 13211, because it is not a significant regulatory action under Executive Order 12866.

*I. National Technology Transfer and Advancement Act (NTTAA)*

This rulemaking does not involve technical standards.

*J. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations and Executive Order 14096: Revitalizing our Nation's Commitment to Environmental Justice for All*

The EPA believes that this action does not concern human health or environmental conditions and therefore cannot be evaluated with respect to potentially disproportionate and adverse effects on people of color, low-income populations and/or Indigenous peoples. The removal of the provisions does not have a material impact on the obligation for sources to comply with current existing standards, or the ability of Federal or State agencies to enforce standards.

## **List of Subjects in 40 CFR Part 63**

Environmental protection, Air pollution control, Hazardous substances, Reporting, and recordkeeping requirements.

**Michael S. Regan,**

*Administrator.*

For the reasons stated in the preamble, the Environmental Protection Agency (EPA) proposes to amend title 40, chapter I, of the Code of Federal Regulations (CFR) as follows:

### **PART 63—NATIONAL EMISSION STANDARDS FOR HAZARDOUS AIR POLLUTANTS FOR SOURCE CATEGORIES**

1. The authority citation for part 63 continues to read as follows:

**Authority:** 42 U.S.C. 7401 *et seq.*

#### **Subpart HH—National Emission Standards for Hazardous Air Pollutants From Oil and Natural Gas Production Facilities**

2. Section 63.760 is amended by adding paragraph (i) to read as follows:

**§ 63.760 Applicability and designation of affected source.**

\* \* \* \* \*

(i) Emissions standards in this subpart apply at all times.

**§ 63.761[Amended]**

3. Section 63.761 is amended by removing the definition “Affirmative defense”.

**§ 63.762 [Removed and Reserved]**

4. Section 63.762 is removed and reserved.

#### **Subpart HHH—National Emission Standards for Hazardous Air Pollutants From Natural Gas Transmission and Storage Facilities**

5. Section 63.1270 is amended by adding paragraph (g) to read as follows:

**§ 63.1270 Applicability and designation of affected source.**

\* \* \* \* \*

(g) Emissions standards in this subpart apply at all times.

**§ 63.1271 [Amended]**

6. Section 63.1271 is amended by removing the definition “Affirmative defense”.

**§ 63.1272 [Removed and Reserved]**

7. Section 63.1272 is removed and reserved.

[FR Doc. 2023-26119 Filed: 11/30/2023 8:45 am; Publication Date: 12/1/2023]